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HAROLD B. WILLEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES.

..... TERM, 1956.

No. [redacted]138

R. R. CARR et al., Citizens of the U. S. A., and Residents of the State of Tennessee,
Petitioners,

vs.

STATE OF TENNESSEE,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of the State of Tennessee.

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vs.

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Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of the State of Tennessee.

On March 9, 1956, the highest Court of Tennessee, the State Supreme Court, affirmed a judgment against R. R. Carr, W. S. Fortner, W. J. Kaiser, Ira S. Wooten, James Yarbrough, John E. White and W. A. White, upon an indictment charging them with an affray and petitioners were given varying jail sentences as follows (R. 973, Appendix A):

(1) R. R. Carr, six months and twenty-nine days in the workhouse,

(2) W. S. Fortner, six months and twenty-nine days in the workhouse,

(3) W. J. Kaiser, ninety days in the workhouse,

(4) Ira S. Wooten, ninety days in the workhouse,

(5) James Yarbrough, six months and twenty-nine days in the workhouse,

(6) John E. White, six months and twenty-nine days in the workhouse, and

(7) W. A. White, eleven months and twenty-nine days in the workhouse.

The State of Tennessee, in so sentencing petitioners, denied them due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States in that

1. There was no evidence to support the verdict of guilty.

2. The verdict of the jury was contrary to law and to the evidence.

3. The verdict of the jury evinces passion, prejudice and caprice.

OPINIONS BELOW.

The only Court filing an opinion below was the Supreme Court of Tennessee (R. 1012, Appendix B).

JURISDICTION.

The jurisdiction of this Court is invoked under the Fourteenth Amendment to the United States Constitution. The entire record in this cause has been designated. On the face of that record there is no legal evidence to support the verdict which is a denial of due process as guaranteed by Section 1 of the Fourteenth Amendment to the United States Constitution.

At the conclusion of the State's proof a motion for a directed verdict was made on behalf of the defendants (R.

429). This motion was renewed at the conclusion of the State's proof (R. 921).

Following the conviction of the defendants the motion for a new trial was filed by defendants incorporating the same contentions (R. 969). The Court overruled the motion for a new trial (R. 973). The Supreme Court of Tennessee, in affirming the trial court's decree, likewise passed upon petitioners' claim which was set out in the Assignment of Errors to the Supreme Court (R. 979), merely stating that these were matters for the jury as there was a conflict in testimony (R. 1014, 1015).

QUESTION PRESENTED.

The entire record in this cause presents one simple question:

Is there a violation of "due process" within the meaning of Section 1 of the Fourteenth Amendment to the United States Constitution when a person is convicted of the crime of affray when the only legal evidence before the court is that such person was merely present at a shooting or fighting in a public place and such person took no part in said shooting or fighting?

STATEMENT.

The basic facts in this cause were not in dispute and are as follows:

The petitioners, along with other union men, went to the Fairgrounds in Memphis, Tennessee, for the purpose of organizing or attempting to obtain work for union men. In fact, an invitation had been extended by the superintendent of the nonunion group to a member of the union group, Vandenburg (R. 600). However, one of the superintendents of construction arranged to have many weapons,

including shotguns, rifles and pistols, brought to the job for the purpose of arming the nonunion men (R. 412, 781-813). As petitioners approached the construction site the nonunion employees opened fire on the union men, shooting and severely wounding four of the within named petitioners. W. A. White was shot in the stomach and as he turned to leave he was shot in the back by James Mitchell, a nonunion employee, who was using a rifle (R. 240, 851).

R. R. Carr, another petitioner, suffered numerous shotgun wounds over his entire back (R. 236) and a wound of the right arm made from a larger caliber gun as he attempted to render assistance to a wounded man (R. 237).

W. S. Fortner was wounded in the left side (R. 235), and John E. White was shot in the back and severely wounded (R. 238, 239). Other union men were wounded in the back or sides who are not petitioners herein.

Further evidence adduced at the trial was that the nonunion employees hid behind a concrete wall for the purpose of shooting the union men upon their arrival at the construction site (R. 75, 108).

The State, in presenting its evidence, read into the record numerous statements taken by City Police Officers at the time of the shooting. The Court correctly charged the jury as to Tennessee Law regarding such statements.

> "Gen. Gandy: If your honor please, as to these statements or any other statements that might be read to the jury, and those already read, I think the jurors should be instructed that anything in a defendant's statement as against another person or implicating another person should not be regarded by the jury.
>
> "The Court: That is correct. Gentlemen, you are instructed by the Court not to consider any statements that implicate another defendant or against another defendant should not be considered for any purpose

whatever. You cannot consider that against any other person."

The shooting was over when the police arrived. The only evidence before the Court at the conclusion of the proof by the State were the above facts that there had been a shooting, at a public place, there was a labor dispute, and certain persons, including the petitioners, were present.

A charge of an affray as defined by the Supreme Court of Tennessee in the case of **Gillen v. State, 185 Tenn. 193,** is the fighting of two or more persons in a public place to the terror of his majesty's subjects.

At the conclusion of the proof by the State the petitioners promptly moved for a directed verdict (R. 429). The State was contented to rest on the mere facts above stated (R. 438). The Court overruled the motion, holding that it was a matter for the jury to decide (R. 440, 441).

The statements taken by the police officers previously referred to contained only denials of the individual persons giving such statements of any participation in any wrongful acts whatsoever, and at the most stated a claim that some other person had either committed or described the legal conduct of other persons.

The testimony, other than that of those who became defendants, consisted chiefly of officers stating what occurred with reference to finding guns and ammunition. This constituted practically nothing which could be attributed to any of these petitioners in support of the charges contained in the indictment.

At the conclusion of all of the proof in the case the State had still failed to present sufficient evidence to convict petitioners with the possible exception of W. A. White, which would have been on evidence that was strongly disputed. The entire case, and the verdict of the jury, against these petitioners was that they were near, or

in the vicinity of the shooting. They were all either shot and severely wounded, or shot at, by the nonunion group. They were seen leaving the scene of the shooting, or had been there and left, or were found wounded near the scene of the shooting. The State's evidence was so presented as to require the jury to speculate on the question of guilt of petitioners. The only conflicting testimony was the rebuttal testimony that one of the petitioners, W. A. White, had a pistol.

The only other evidence was that two days prior to the shooting the nonunion group testified that some union men had beat a nonunion man with iron rods at the construction site. Yet there had been no complaint to the police, nor had a warrant been sued out, and no other action taken.

The jury returned a verdict against the five non-union participants who shot petitioners in the back, fining them in varying degrees from $51.00 to $100.00 (R. 999). The admitted leader of the non-union group, Paul Branson, the Superintendent who condoned bringing the guns to the job (R. 813), knew that they were there, was fined only $51.00 (R. 999). All of the union men were convicted and petitioners were given long jail sentences.

REASONS FOR GRANTING THE WRIT OF CERTIORARI.

Fully realizing the responsibilities of the States in the enforcement of criminal laws, it is submitted that the due process laws are so rooted in the traditions and conscience of our people as to be ranked as fundamental.

In the case of **Craig v. Harney, 331 U. S. 367**, the Supreme Court stated as follows:

> "In a case where it is asserted that a person has been deprived of a fundamental right secured by the

Constitution, an independent examination of the facts by the Court is often required to be made."

In the case of **Copperwald Steel Company v. Industrial Commission, 324 U. S. 780,** the Supreme Court held that a question under the Fourteenth Amendment may be deemed to have been involved and passed upon although the Fourteenth Amendment was not referred to. The decision in this instant case could not have been made without necessarily deciding that the petitioners had been convicted upon legal evidence. If there was no legal evidence then it would appear that petitioners were deprived of some fundamental right by the verdict of the jury and the failure of the court to properly instruct the jury or to overrule the decision of the jury.

From the entire record in this cause it is submitted that a federal question was raised although it was not specifically pointed out as such as no decision could have been made without necessarily involving the question of whether or not there was sufficient evidence to permit the matter to be submitted to the jury. The United States Supreme Court has held that it has the duty of alertness in safeguarding rights guaranteed by the Constitution of the United States. In **Uveges v. Commonwealth of Pennsylvania, 335 U. S. 437,** the Court held that a federal question was raised by the mere refusal of the State to grant the right of counsel to the accused, yet no reference was made to the Constitution.

Turning to the fundamental rights secured by the Constitution, as stated in **Craig v. Harvey** (supra), an examination of the facts by this Honorable Court will reveal that the petitioners were convicted by the trial jury without any legal evidence upon which to base a conviction. For example, if a person were charged and convicted of murder and the only evidence presented to the jury was that the defendant was present at the scene, could the convic-

tion stand? Under such facts there would be a directed verdict of acquittal immediately by the court, notwithstanding the reluctance of appellate courts to approve directed verdicts, **Bright v. State, 191 Tenn. 249.**

The trial judge, in refusing to direct a verdict on behalf of petitioners, but directing a verdict for others, at the conclusion of all proof, made the following observation and ruling (R. 935-7):

> "I think the Court is correct in making the statement about all these defendants. They were all present during the shooting, except Putman and Mr. Jowers. As to the others, the Court is thinking of Union men as well as non-Union men, and it is the Court's honest recollection that these other men were there somewhere close by. Of course, they all didn't have to be in one location or one place, those participating in this particular offense, and the Court feels as to those who were present, maybe they had just gotten there and maybe they were the first ones to arrive or maybe they arrived later, but under this theory of the law on aiders and abettors, mere presence doesn't make a defendant a principal or a participant, but it requires more than mere presence, and as to whether or not this requirement, in addition to mere presence, is present in this case against these other defendants, the Court feels is a question for the jury. The law says that mere presence alone does not make a person guilty of the offense, but a person has to be present, ready and willing, with criminal intent, to aid and abet someone else in the commission of the offense, then the principal and aider and abettor are tied together by that theory of the law, and the Court is definitely of the opinion that it should hold in the case that those who were present, whether they were principals or aiders and abettors, whether they are aiders and abettors, is a question for the jury. They

> are the sole judges of the facts. As to these two defendants, Putman and Jowers, it appears to the Court that they practically got off the scene completely out there. * * * That is the Court's honest feeling about those two. Therefore, the Court will direct the jury to render verdicts of not guilty in favor of Jowers and Putman, Floyd Jowers and Marvin Putman. As to the other defendants, the Court will permit the question of whether they are aiders and abettors to go to the jury and allow the jury to decide that particular question."

Prejudice, passion and caprice in the minds of the jury was clearly revealed by the discriminatory fines and jail sentences adjudged against union defendants who were each given long jail sentences or large fines. These men were the very ones who were shot and severely injured by the nonunion defendants, yet the jury took it upon itself to say that these union men who were shot in the back should have the maximum sentences in face of the fact that the men who shot petitioners, and admitted their guilt, were found guilty of the same offense as these petitioners, but were required to pay fines only of from $51.00 to $100.00. Where is the dividing line between the person who is guilty of affray by shooting another person and the person who is guilty of affray by having been shot in the head, stomach, back, feet and arms, as occurred in this case?

The Supreme Court of the State of Tennessee, in its opinion (R. 1012, Appendix B hereto) merely refers to the labor dispute existing at the Fairgrounds, and that on two prior occasions union men had come to this construction site. There had been alleged personal violence involving one nonunion man two days prior to the shooting. The Court then states that the jury might reason that the nonunion men expected violence two days later when twenty to twenty-five union men appeared on the scene and for that reason the nonunion men had fortified themselves

with guns, rifles and other weapons. Assuming all of this to be true, was there an affray within the interpretation of Gillen v. State, supra?

It is further submitted that on the day of the shooting the facts in this cause show that the union men did nothing more than walk into an ambush. As soon as the first shot was fired the union men began running and several union men, including four of the petitioners herein, were shot in the back as they retreated. The only evidence in the record that any of these seven petitioners had guns, made any statements or committed any overt acts whatever, was the vigorously disputed statement that petitioner, W. A. White, had a pistol. The only possible guilt of the other six petitioners in this cause is "Guilt by Association." They were merely at the public place where the shooting occurred. These union men were caught in a net in which everyone present at the shooting was indicted and were convicted by the prejudice of the jury.

CONCLUSION.

For the reasons set forth above, it is respectfully submitted that petitioners were convicted in violation of the due process clause of the Fourteenth Amendment, and they are at least entitled to a new trial. Accordingly, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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Of Counsel.

APPENDIX A.

Identified
Perry H. Sellers, Judge
9-23-55

Whereupon, on the 28th day of July, 1955, the defendants' Motion for a New Trial came up for hearing before the Court, and after argument of Counsel for the State and Counsel for the defendants, the Court denied the said Motion for New Trial.

Whereupon the defendants, through their counsel of record, interposed an exception to the action of the Court in overruling Motion for a New Trial.

Whereupon the defendants being required to stand up, the Court imposed sentence as follows: W. A. White, Jr.; R. R. Carr; W. D. Fortner; James Yarbrough; John E. White; Wm. Joseph Kaiser; Ira S. Wooten be taken by the Sheriff and remanded to Jail and at his earliest convenience deliver them to the Workhouse: therein W. A. White, Jr., to be for a period of Eleven Months and Twenty-nine Days; R. R. Carr to Be Confined for a Period of Six Months and Twenty-nine Days; W. D. Fortner to Be Confined for a Period of Six Months and Twenty-nine Days; James Yarbrough to Be Confined for a Period of Six Months and Twenty-nine Days; John E. White to Be Confined for a Period of Six Months and Twenty-nine Days; William Joseph Kaiser to Be Confined for a Period of Ninety Days; Ira S. Wooten to Be Confined for a Period of Ninety Days and That They All Pay the Cost of This Prosecution for Which Let Mittimus and Execution Issue.

Thereupon, the defendants prayed an appeal to the next term of the Supreme Court, and was by the Court allowed thirty (30) days within which to file and have signed and approved the Bill of Exceptions, and take all steps necessary to perfect the appeal.

Thereafter, on the 12th day of July, 1955, on application of the defendants the Court ordered that the time theretofore allowed for filing and approving the Bill of Exceptions be extended for an additional sixty (60) days for all purposes necessary in perfecting the appeal.

Thereupon, on the 23rd day of September, 1955, the defendants through their counsel of record, and within the time allowed by the Court, tendered in open Court, this said Bill of Exceptions and asked that the same be signed, sealed and approved, and made a part of the record in this cause, which is, by the Court, accordingly done, and the same is hereby approved by the Court and made a part of the record in this cause.

Perry H. Sellers,
Judge.

O. K.:

Braxton C. Gandy,
Attorney for State.

O. K.:

W. Preston Battle,
Attorney for Defendants.

Filed 9-23-55,
J. A. Blackwekk, Clerk,
By Earl E. Fitzpatrick, D. C.

APPENDIX B.

Filed
Mar. 9, 1956
David S. Lansden
Clerk

R. R. Carr et al.
v.
State of Tennessee.
} Shelby Criminal.

For Plaintiff in Error:
H. G. B. King,
Chattanooga, Tennessee.

For Defendant in Error:
Nat Tipton,
Advocate General.

Opinion.

The defendants below, R. R. Carr, W. S. Fortner, W. J. Kaiser, Ira S. Wooten, James Yarbrough, James E. White and W. A. White, were convicted of an affray and were given fines and jail sentences from which they have appealed in error here.

The fight took place on August 26, 1954, at the Fair Grounds in Memphis, where a group of non-Union laborers were erecting a building. It seems that the Union group went out to the Fair Grounds and vigorously protested that the construction was being done by non-Union men. The record indicates that these Union men undertook to obstruct the work by pouring molasses in the gasoline of an appliance and by putting graphite in the equipment.

It appears that on Tuesday, August 24th, a group of men, two of whom are identified in this case, went out to the Fair Grounds, and made a non-Union worker come down from a ladder on which he was working and beat him quite severely with iron rods.

On the next day, that is, August 25th, a Union group assembled at this same place and armed with bludgeons made demonstrations against the non-Union group. The latter armed themselves with wrenches and other weapons and then the Union group left without any assault being made.

On the morning of August 26th a number of members of the Union met in South Memphis, which was quite a distance from the Fair Grounds, and went to this latter place in ten or twelve automobiles, there being about twenty or twenty-five members of the Union in this group. This group included the seven defendants. They claim that they went out to the Fair Grounds to contact the person in charge of the construction to urge him to use Union labor.

It seems that the business agent of this Union, on the day before, told the construction foreman that the Union men were very much upset about the situation, and that they were arming themselves with knives and other weapons. It seems that the non-Union group brought several shotguns and rifles to the place where they were working.

On the afternoon of the 26th of August a group of Union men went to the Fair Grounds and, after a conference among themselves, advanced upon the non-Union workers.

The witness Bardill testified that he heard the non-Union group more than once ask the Union group not to come into the building where they were working but to go away and leave them alone.

The witness Mason testified that he saw this group of men move into the building, heard some gun fire and then saw them run back to their cars carrying something in their hands and left the scene.

There is a conflict in the testimony between the versions of the Union and non-Union men. The non-Union workers, who had received fines have not appealed and they testify

that the Union group paid no attention to their warnings not to come upon the premises, and that the defendant W. A. White pulled a pistol and began firing. Six of the non-Union group testified to having seen White pull his pistol and fire.

The non-Union group further testified that they procured arms and returned the fire. It seems that two or three of the Union men were wounded in this fight. All of the defendants are shown to have been present on this occasion and participating in the fight.

The defendants insist that they went to this building for the purpose of having a friendly discussion and to protest the employment of non-Union men.

Now it appears that these Union workers met in South Memphis, and planned the trip out to the Fair Grounds. There were twenty or twenty-five of these people who went out to this building. They insist that their mission was peaceful, but we think that the jury were within their province when they did not accept this explanation. The jury might conclude from the fact that they came in a rather large group, and when W. A. White drew a pistol and fired at the non-Union man, the purpose of their visit was not peaceful.

It is insisted here that these judgments against the seven defendants should be reversed or if not they should be relieved of their jail sentences.

However, this was a matter for the jury and they found from the proof that these defendants were the aggressors, and evidently found that the nonunion group were within their rights to some extent, at least, in protecting their rights.

In **Turner v. State, 188 Tenn., at page 322,** this Court said, quoting from **Ferguson v. State, 138 Tenn. 107,** as follows:

> "We have said in numerous cases that the verdict of the jury determines the credibility of witnesses. This is necessarily so. We do not see the witnesses nor hear them testify, and mere discrepancies in their testimony must be deemed settled by the verdict of the jury unless there is something to show that such discrepancies originated in willful falsehood."

As before stated, the defendants were indicted for an affray. This offense has been defined as the fighting of two or more persons in some public place to the terror of those assembled. **Gillen v. State, 185 Tenn. 193.**

The record shows that this place was a public place and that bullets were flying around not only the participants, but bystanders.

There is some contention made of the charge of the court for inadequacy. However, if the defendants are of the opinion that the charge is inadequate it was their duty to tender a special request setting forth their contention. This was not done and this Court will not consider such omission. **Turner v. State, 188 Tenn. 312.**

We have considered all of the assignments of error, find them without merit and the judgment of the lower court is affirmed.

/s/ Prewitt.
Prewitt, J.

APPENDIX C.

R. R. Carr, W. D. Fortner, Wm. Jos. Kaiser, Ira S. Wooten, James Yarbrough, John E. White and W. A. White

v. (Nos. 36622 & 69021)

State of Tennessee.

Shelby Criminal.
Stay Order.

This cause coming on further to be heard upon a petition of R. R. Carr, W. D. Fortner, Wm. Joseph Kaiser, Ira S. Wooten, James Yarbrough, John E. White and W. A. White for a stay order on their conviction of affray, as charged in the indictment, heretofore affirmed by this Court, they having signified their intention to file a petition for certiorari to the Supreme Court of the United States seeking a review and a reversal of this Court, upon consideration of which the Court is pleased to grant their petition upon the following conditions, to wit:

That Ira S. Wooten and William Joseph Kaiser execute a good and solvent bond in the sum of two hundred fifty dollars ($250.00) each; that W. A. White execute a good and solvent bond in the sum of one thousand dollars ($1,000.00); and that James Yarbrough, W. D. Fortner, John E. White and R. R. Carr execute a good and solvent bond in the sum of seven nundred fifty dollars ($750.00) each; all of said bonds conditioned for their appearance before this Court or some lawful officer thereof from day to day and time to time as the Court may direct, said bonds to be executed before and approved by the Clerk of the Criminal Courts of Shelby County, Tennessee.

It is therefore ordered and adjudged by the Court that upon compliance with the above conditions, a stay of further action by the courts of Tennessee be and is hereby

allowed for the purpose set out above, and said Ira S. Wooten, William Joseph Kaiser, W. A. White, James Yarbrough, W. D. Fortner, John E. White and R. R. Carr are ordered released from custody of the Sheriff of Shelby County, Tennessee, upon compliance with the terms of this order, and it is so ordered and adjudged. The Clerk of the Criminal Courts of Shelby County will transmit the bonds, when executed, to the Clerk of this Court. 3/12/56.

A. B. Neil,
Chief Justice.